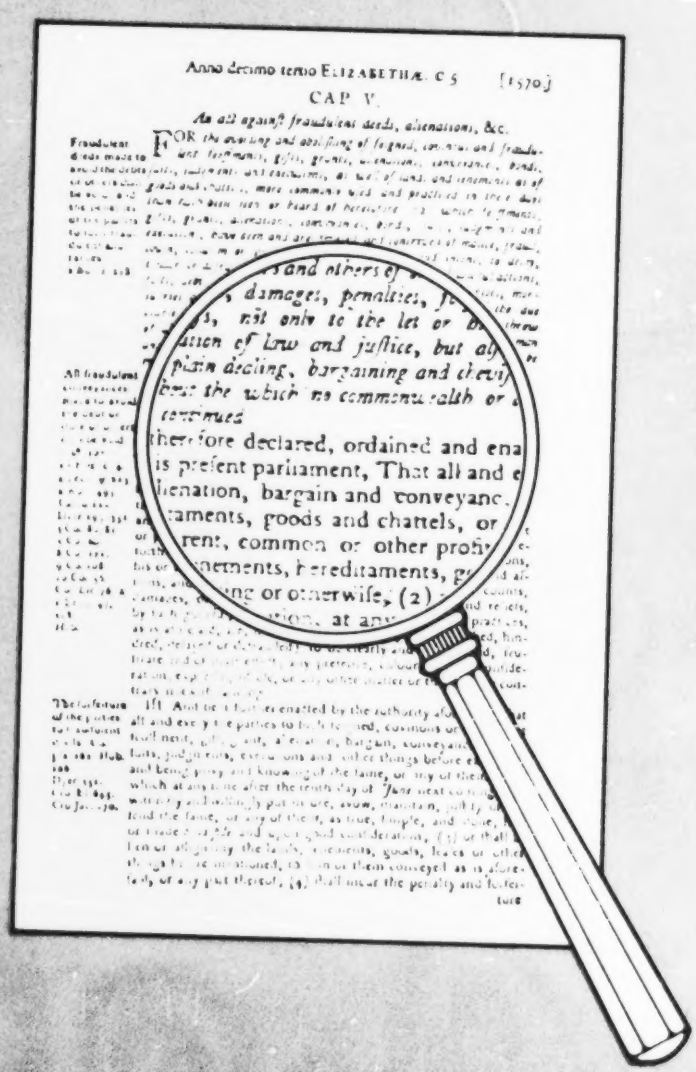
Proposals Relating to Joint Obligations

Report to the Minister of Justice

Saskatchewan


Anno decimo tertio ELIZABETHÆ. c 5 [1570]

CAP V.

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which at any time after the tenth day of June next co[illegible]

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[illegible] lers or alleging the lands, tenements, goods, leases or other

[illegible] thereof to be mortgaged, assigned or them conveyed as is aforesaid, or any part thereof, [illegible] shall incur the penalty and forfeiture

PROPOSALS RELATING TO JOINT OBLIGATIONS

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

June, 1985

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Professor DOUGLAS A. SCHMEISER, Q.C., B.A., LL.B., LL.M., S.J.D., Chairman

Madam Justice MARJORIE A. GERWING

Mr. GORDON J. KUSKI, Q.C., LL.B.

Mr. Kenneth P. R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J. W. Finley, B.A., M.A., LL.B. and Mr. C. Peter Thagard, LL.B. are the Legal Research Officers. Mr. Roderick J. Wood, LL.B., LL.M., Dip. in Legislative Drafting and Mrs. Sandy Antonini-Ready, B.A., LL.B. are full-time Legal Research Officers under contract to the Commission. The secretaries are Mrs. Sandra Ritchie and Miss Pat Harasymchuk.

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The Law Reform Commission Act.

> 6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

* * * * * *

Saskatchewan

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The Honourable J. Gary Lane, Q.C.
Minister of Justice
Province of Saskatchewan
Regina, Saskatchewan

Dear Mr. Minister:

The Commission has reviewed the difficult distinction in contract law between obligations that are joint, and obligations that are joint and several. This distinction arises whenever two or more persons together make a promise to a third person. The report recommends abolition of the distinction by deeming all joint obligations to be joint and several. In addition, it recommends that where a joint and several obligation is owed by two or more persons, a release of one should not ordinarily release the others.

The review was undertaken at the suggestion of Mr. Justice Kenneth R. MacLeod of the Court of Queen's Bench. Research shows that for over 35 years various scholars have proposed elimination of the distinction between joint contractual obligations and joint and several contractual obligations, a distinction which creates a trap for the unwary, yet serves no legitimate purpose.

This report, proposing a Joint Obligations Act, is submitted pursuant to section 9 of The Law Reform Commission Act.

Respectfully submitted this 12th day of June, A.D. 1985.

Douglas A. Schmeiser, Q.C.,
Chairman

Madam Justice Marjorie A. Gerwing, Commissioner

Gordon J. Kuski, Q.C.
Commissioner

TABLE OF CONTENTS

I. INTRODUCTION 7

II. JOINT OBLIGATIONS AND JOINT AND SEVERAL OBLIGATIONS .. 7

III. RELEASE OF ONE CO-PROMISOR 11

IV. CO-PROMISEES 11

V. COSTS 12

VI. SUMMARY OF PROPOSALS 13

VII. PROPOSED LEGISLATION 13

PROPOSALS RELATING TO JOINT OBLIGATIONS

I. INTRODUCTION

It is not uncommon for two or more persons to enter into a contract with another party. A husband and wife may enter into an agreement for the purchase of a house. A parent may co-sign the loan application of his son or daughter. Several individuals may agree to purchase a business. In each of these instances a contractual promise is made by more than one person. In law, this kind of promise creates obligations that are sometimes categorized as "joint", and sometimes categorized as "joint and several". Depending on the categorization, different legal rules apply and different consequences follow. This report critically examines the differences between contractual obligations that are "joint" and those that are "joint and several".

In 1949, Glanville Williams described joint obligations as:

> . . . a difficult and seriously defective part of the common law . . . [that] is overdue for reconsideration from a legislative point of view . . . . What is needed is that joint liability as a legal conception should cease to exist, and that every obligation now read as joint should be read as joint and several.[1]

Thirty-six years later, this report recommends that the distinction in contract law between joint obligations and joint and several obligations be abolished.

This report also examines one other aspect of co-promises; the rules applicable where a release is given to one co-promisor require special treatment.

The Commission's proposals are directed only to joint obligations arising through contract. Although somewhat analogous issues relating to releases, merger and contribution may arise in tort law, obligations arising in tort raise different policy issues and are beyond the scope of this paper.

II. JOINT OBLIGATIONS AND JOINT AND SEVERAL OBLIGATIONS

If A promises to pay C $50.00, and B also promises to pay C $50.00, the promises are independent and are categorized as "several". The rights and obligations between A and C are unaffected by the rights and obligations between B and C. This is so even if the promises are contained in the same document.[2]

If A and B together promise to pay C $100.00, however, there is an obvious interdependence between the obligation of A and the obligation of B. Such "co-promises", as they will be referred to in this paper, are categorized as either "joint" or "joint and several". The extent to which the rights and obligations of one co-promisor are affected by the rights and obligations of another depends on the category into which the co-promise falls.

If A and B in the same instrument promise to pay C $100.00, the obligation is prima facie joint. In this case, there is only one promise, one obligation, one cause of action. Thus, any event that discharges the obligation for one joint promisor necessarily discharges it for all.[3] Judgment against

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[1] Glanville L. Williams, *Joint Obligations*, London: Butterworth & Co., 1949, at 3.

[2] *Chitty on Contracts*, 25th ed., ed. A. G. Guest, London: Sweet & Maxwell, 1983, Vol. I, at 651.

[3] *Ibid.*, at 656.

one joint promisor bars a subsequent action against the others.[4] Subject to certain exceptions, all joint promisors must be joined as defendants to enforce the joint promise.[5] Tender by or notice to one joint promisor is tender by or notice to all.[6] A misrepresentation to one joint promisor provides a defence to all.[7] At common law, joint promises were also subject to a survivorship rule: if one joint promisor died, the surviving promisors became responsible for the obligation, and the promisee could not look to the estate of the deceased.[8] Only when the last joint promisor died did the obligation devolve upon his estate. Section 63 of *The Trustee Act*,[9] however, now allows a promisee to proceed against the estate of a joint promisor in the same manner as if the promise had been joint and several.

None of these rules apply where a co-promise is construed as including not only a joint promise, but also separate promises from the individual promisors. If A and B promise "for themselves and for each of them" that they will pay C $100.00, the obligation is joint and several.[10]

The presumption is that a co-promise is joint in the absence of express words to the contrary. Any words indicating that the promisors not only jointly promise to do the same thing, but also individually promise to do it, will make the obligation joint and several. Subject to certain very limited exceptions, the question is one of intention, and the intention of the contracting parties must be ascertained by the words of the contract alone.[11] Looking for the intention of the contracting parties in the words of the contract is particularly artificial and difficult when, as is usually the case, they have not addressed their minds to the issue.

The distinction between joint liability and joint and several liability has an ethereal quality that makes it difficult to grasp. Cases decided at common law have drawn lines of distinction such as the following:

> . . . [I]f two covenant for themselves or any of them that they will pay the covenant is joint and several; but if they covenant for themselves that they or any of them will pay the covenant is merely joint.[12]

The common law draws a less incomprehensible but equally perplexing distinction in relation to promissory notes. If A and B sign a note that reads "we promise to pay $100.00 to C", their liability is joint. But if A and B sign a note that reads "I promise to pay $100.00 to C", their liability is joint and several.[13]

The law is not well served by distinctions such as these. Too much turns on the particular wording of the contract, wording to which the contracting parties often gave no real thought.

The differing treatment given to the two categories of co-promises is of limited practical significance in questions between co-promisors. A co-promisor who pays out more than his share is entitled to contribution from the other co-promisors, whether the obligation is joint or joint and several. The distinction takes on its greatest significance in issues involving the right of the

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[4] *Kendall* v. *Hamilton* (1879), 4 A.C. 504 (H.L.); *Bank of Nova Scotia* v. *Stanek* (1982), 16 Sask. R. 214 (Q.B.).

[5] The exceptions extend to a joint promisor who is out of the jurisdiction or who is a minor. Other exceptions are noted in *Chitty on Contracts*, *supra*, note 2, at 653.

[6] Williams, *Joint Obligations*, *supra*, note 1, at 63.

[7] *Ibid.*, at 42, 157-58.

[8] *Ibid.*, 157-158.

[9] R.S.S. 1978, c. T-23.

[10] Williams, *Joint Obligations*, *supra*, note 1, at 38.

[11] That is, the parol evidence rule applies; see Williams, *Joint Obligations*, *supra*, note 1, at 43-44.

[12] *Ibid.*, at 40.

[13] *Ibid.*, at 39; this distinction is expressly preserved by section 179 of *The Bills of Exchange Act*, R.S.C. 1970, c. B-5.

promisee to maintain proceedings against a particular co-promisor. As Glanville Williams has noted, where the law prescribes different rules for obligations that are joint, the difference is invariably to the disadvantage of the promisee.[14]

The results are potentially harsh. The best known case where a promisee was prevented from obtaining satisfaction against joint promisors is *Kendall* v. *Hamilton*, decided by the House of Lords in 1879.[15] The plaintiff contracted with Wilson and McLay, who were partners and therefore jointly liable under the contract.[16] The plaintiff was unaware of a silent partner named Hamilton, who was also jointly liable. Judgment was obtained against Wilson and McLay, but each was insolvent. The plaintiff then discovered the existence of Hamilton, who was solvent. However, the House of Lords held that the cause of action had merged in the judgment against Wilson and McLay. Because the joint obligation created only one cause of action, it was extinguished by the judgment. No action could be maintained against Hamilton.

The doctrine of merger has been criticized by Professor Williams as a "pure technicality . . . [that] should not be allowed to work injustice".[17] Fleming has described the merger rule as "preposterous".[18] In England, the rule was abolished by section 3 of the Civil Liability (Contribution) Act 1978, which expressly provides that a judgment against one joint debtor does not bar subsequent proceedings against the others.

In addition to the merger problem, one other incident of joint liability gives rise to particular difficulties. The joinder rule — that a joint promisor has the right to insist that all the joint promisors be joined as parties to an action on the promise[19] — is a source of unnecessary inconvenience and expense. A plaintiff may face the additional expense of serving all joint promisors, even those known to be insolvent or difficult to locate. If a plaintiff is unsuccessful at trial, he will have to pay additional sets of costs.

The joinder rule came into existence at a time when a defendant had no means available to him of bringing into court other parties liable with him. Third party procedure now allows a defendant to add as a party any person against whom he has a right of contribution.[20] Before third party procedure was enacted, the joinder rule served a useful purpose in ensuring that parties liable for contribution would be part of the proceedings. Thus, in at least some cases the rule obviated the necessity of additional litigation between joint promisors to enforce a right of contribution. This function, however, is no longer needed:

> . . . [T]he reason [for the rule] no longer has validity since the introduction of third-party procedure, for under this procedure it is always open to a defendant to claim in the same proceedings against parties who are liable to contribute towards the plaintiff's claim. The rule has therefore lost its *raison d'etre*, and the time is ripe for its abolition.[21]

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[14] *Ibid.*, at 35.

[15] *Supra*, note 4.

[16] At common law, a contract by a partnership generally denoted a joint obligation. The point is now covered by statute; see *The Partnership Act*, R.S.S. 1978, c. P-3, s. 11.

[17] Williams, *Joint Obligations*, *supra*, note 1, at 95-96.

[18] John G. Fleming, *The Law of Torts*, 5th ed., Sydney: The Law Book Company Limited, 1977, at 240.

[19] At one time, failure to join all joint promisors entitled a defendant to raise a "plea in abatement", so that only the defendant's (or defendants') proportional share of the liability would be included in the judgment. Today, a defendant is entitled instead to a stay of proceedings until the other joint promisors are added as parties; see *Kendall* v. *Hamilton*, *supra*, note 4.

[20] See Rule 107 of the Saskatchewan Queen's Bench Rules of Court.

[21] Williams, *Joint Obligations*, *supra*, note 1, at 57.

It can be argued that the joinder rule (in conjunction with the merger rule) is useful in preventing a multiplicity of lawsuits where only one matter is at issue.[22] It is true that the rule is effective in limiting a plaintiff to one action to enforce a claim against joint promisors. In most cases, however, the trouble and cost of litigation is its own deterrent.

There are two other possible justifications for the joinder rule that have greater merit. Without the joinder rule a joint promisor could become liable for contribution to another joint promisor, even though the former had no opportunity to participate in the defence of the action that gave rise to the claim for contribution. A problem could also develop with inconsistent verdicts. A plaintiff who unsuccessfully sues one co-promisor should not be entitled to a second day in court against another co-promisor. This last problem, however, is more theoretical than real, because in practice the courts would be reluctant to render a judgment in the second action that appeared to be at odds with the judgment in the first action.

The best answer to both arguments is that if there are valid policy reasons for rules preventing a multiplicity of actions on a joint promise, those reasons should apply equally well to a promise made jointly and severally. A plaintiff can, at present, bring as many actions as there are joint and several promisors.[23] The case law presents no evidence that this right has been abused. It may be that special sanctions in costs are appropriate to discourage unnecessary duplication of litigation,[24] but the threat of multiple lawsuits cannot stand as a defence of the difference in joinder rules between joint obligations and those that are joint and several.

The distinction between joint liability and joint and several liability appears to have been an accident of the common law.[25] Whatever reasons once existed for the distinction are now gone. The distinction should, in the words of Glanville Williams, "cease to exist". This can be accomplished by enacting that all co-promises be construed as creating joint and several obligations, and the Commission so proposes. This would eliminate both the merger problem and the joinder problem.

The proposed enactment should be operative notwithstanding any express contractual designation of obligations being "joint"; few contracting parties appreciate the import of the designation. However, it should be open to contracting parties, if they wish, to expressly agree that what are now specific incidents of joint obligations, such as the merger rule, the joinder rule, or the survivorship rule, will apply to their bargain. There is nothing inherently objectionable about these consequences as long as they are actually bargained for, and are not unexpected incidents of failing to expressly designate contractual liability as "joint and several".

Two consequential amendments follow from these recommendations. Section 63 of *The Trustee Act*[26] and section 11 of *The Partnerships Act*,[27] previously referred to above, pertain to the survivorship rule applicable at common law to obligations that are joint. If all obligations are made joint and several, these provisions become redundant. They should be repealed.

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22 This point of view was explored, and ultimately rejected, in an article by John W. Reed, "Compulsory Joinder of Parties in Civil Actions" (1957), 55 *Michigan Law Review*, 327.

23 Williams, *Joint Obligations*, *supra*, note 1, at 60.

24 This avenue is explored, *infra*, at p. 12 of this report.

25 The parallel distinction in property law between two classes of co-ownership — joint tenancy and tenancy in common — suggests that the distinction in contract law perhaps arose by analogy.

26 R.S.S. 1978, c. T-23.

27 R.S.S. 1978, c. P-3.

Perhaps surprisingly, the distinction between joint obligations and joint and several obligations has not yet been the subject of review in any of the other common law provinces. No provincial legislature or law reform agency has addressed the question, although both the Ontario and British Columbia Law Reform Commissions have suggested that the area may in the future be studied.[28]

III. RELEASE OF ONE CO-PROMISOR

Deeming all joint promises to be joint and several would leave one problem. The legal effect of a release given to one co-promisor merits special consideration.

It is not surprising in theory that a release of one joint promisor constitutes a release of all joint promisors. Because there is only one obligation, a discharge of one promisor logically discharges all. What is surprising is that a release of one joint and several promisor discharges the others.[29] This has been described as "illogical",[30] but it rests on a line of cases dating back to 1641, and is the law today. The courts have mitigated the rule slightly by drawing a distinction between a release and a covenant not to sue one co-promisor, holding that in the latter case an action against the other co-promisors is not barred.[31] As well, some cases have suggested that a release of one joint debtor made with the knowledge and consent of the others will not operate as a release of all.[32] In any event, these judicially created solutions are piecemeal at best.

Mr. Justice Cardozo referred to the rule that a release of one person jointly liable releases all as "an encumbrance and a snare".[33] Professor Fleming in 1977, speaking of the release rule, which operates in the same way in tort law, stated that "miraculously this anachronism has so far escaped statutory reform".[34] The obvious mischief is that a promisee would not intuitively expect that a release granted to one person liable to him would take away his right to pursue the other co-promisors. Glanville Williams concluded in 1949 that "legislation is clearly necessary, and the only question is what rule should be put in its place".[35] The most straightforward solution, and that advocated by Professor Williams, is to reverse the rule, so that a release of one co-promisor does not release the others unless there is evidence of an intention to release the others. The Commission so recommends.

IV. CO-PROMISEES

Thus far this report has focused entirely on obligations owed to one person by two or more persons. Another side of joint obligations involves an obligation owed to two or more persons by one person. An example is the obligations of a bank towards joint depositors. Obligations owed to

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[28] See the British Columbia Law Reform Commission's Annual Report, 1983-84, at p. 4, and the Ontario Law Reform Commission's Annual Report, 1983-84, at p. 15.

[29] *Chitty on Contracts*, *supra*, note 2, at 656.

[30] *Ibid*.

[31] *Ibid*.

[32] See, for instance, *Canadian Imperial Bank of Commerce* v. *Vopni* (1978), 86 D.L.R. (3d) 383 (Man. Q.B.) and authorities cited therein.

[33] Benjamin N. Cardozo, *Law and Literature*, New York: Harcourt, Brace & Co., 1931, at 51.

[34] *The Law of Torts*, *supra*, note 18, at 241.

[35] Williams, *Joint Obligations*, *supra*, note 1, at 137.

co-promisees may be joint or joint and several. In England, by *The Law of Property Act, 1925*,[36] a promise made to persons jointly will in certain instances be construed to have been made to them jointly and severally, so that a joint promisee may bring an action on the promise without joining the others.[37] However, for reasons that follow, the Commission does not recommend that obligations to co-promisees be deemed to be owed to them jointly and severally.

It would be awkward to speak of co-promisees as each having a several right in addition to the joint right, because the one promisor has made only one promise.[38] Further, and more significantly, the problems caused in the context of co-promisors by the joinder requirement and the merger rule do not cause similar problems in regard to co-promisees. One joint promisee cannot sue on the promise without joining the other promisees, but if they refuse to join in the action as co-plaintiffs, they can be added as defendants.[39] Thus, the joinder rule is never a major obstacle. The merger rule is simply inapplicable, because there is only one promisor, and therefore only one possible judgment. Finally, deeming co-promisees to have a joint and several right could create problems. If A has promised to pay B and C $100.00, and B were allowed to sue A without including C in the proceedings, B could conceivably collect without C's knowledge. Although C would be entitled to a subsequent accounting from B, C might not learn that the debt has been collected.

For these reasons, the proposals in this report are applicable only to co-promisors, and not to co-promisees.

V. COSTS

Earlier it was suggested that costs might be used as an instrument for deterring unnecessary duplication of actions. The courts at present do have a discretion to utilize costs in that manner.[40] Nevertheless, it would be useful to include an express direction to the courts to penalize in costs a plaintiff who brings more actions than are reasonably necessary in the circumstances. For this reason the draft legislation proposed in this report includes a provision directed at costs. The provision is similar to section 4 of the English *Civil Liability (Contribution) Act, 1978*.[41]

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[36] 15 & 16 Geo. 5, c. 20, s. 81(1).

[37] *Hals. Laws*, 3rd ed., London: Butterworth & Co., Vol. 8, at 61, para 101.

[38] In *Catlin* v. *Cyprus Finance Co-op (Landen) Ltd.*, [1983] 1 All E.R. 809 (Q.B.D.), although the obligations of the defendant bank towards the holders of a joint account were found to be joint, it was held that there was a several obligation as well. However, the several obligation — not to allow withdrawals by one depositor without the signatures of both — was clearly collateral to and independent of the fundamental obligation of the bank, which could logically only be categorized as joint.

[39] *Milliken* v. *Young*, [1929] 1 W.W.R. 213 (Sask. C.A.).

[40] Rule 542 of the Rules of the Court of Queen's Bench confers on the court an unlimited discretion as to costs, but this discretion must be exercised in accordance with accepted principles. Although one such principle is that a successful plaintiff is entitled to costs, this principle may be overridden. Bringing two actions where one would have sufficed is one instance where the court may deny a successful plaintiff his costs: see Mark M. Orkin, *The Law of Costs*, Toronto: Canada Law Book Limited, 1968, at 52; see also Williams, *Joint Obligations*, *supra*, note 1, at 61.

[41] c. 47 (U.K.).

VI. SUMMARY OF PROPOSALS

(1) All co-promises should be treated as creating joint and several obligations, and not joint obligations;

(2) A release of one co-promisor should not release the other co-promisors unless the release was intended to discharge the others;

(3) A plaintiff who without good reason brings more than one action to enforce a co-promise should be penalized in costs.

VII. PROPOSED LEGISLATION

An Act respecting Joint Obligations

Short Title

1 This Act may be cited as *The Joint Obligations Act*.

Co-obligations deemed joint and several

2(1) Where two or more persons together contract with another person, their obligations under the contract are joint and several, whether or not such obligations are described in the contract as joint.

(2) Subsection (1) applies only to contracts entered into after the coming into force of this Act.

(3) The parties to a contract may expressly provide that:

(a) all co-promisors must be joined in an action on a co-promise contained in the contract;

(b) a cause of action against co-promisors arising out of the contract will merge in a judgment against any of the co-promisors on the same cause of action;

and such provision is effective notwithstanding anything in this Act.

Release of one co-obligor does not release all

3(1) Where two or more persons together contract with another person, a release given to one or more of them does not operate as a release of the others, unless it was intended as a release of all of them.

(2) Subsection (1) applies only to releases granted after the coming into force of this Act.

Costs

4 Where a plaintiff without reasonable cause brings more than one action to enforce a contractual obligation owed by two or more persons, he shall not be entitled to the costs of the second or subsequent actions.

Rev. Stat. c. T-23, s. 63, and c. P-3, s. 11 repealed

5 Section 63 of *The Trustee Act* and section 11 of *The Partnership Act* are repealed.